UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Respondent-Appellant, vs. VERON ATCHLEY, Petitioner-Appellee.	No. 22735

APPELLANT'S BRIEF

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JURISDICTION

The jurisdiction of this Court to entertain this appeal from the United States District Court's order granting appellee's petition for a writ of habeas corpus is conferred by Title 28, United States Code, section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has been issued.

STATEMENT OF THE CASE

A. Proceedings in the state court:

Appellee, Veron Atchley, was convicted after a jury trial in the Superior Court of the State of California for the County of Butte of murder in the first degree and the death penalty was imposed (TR 30-31).[1/]

An automatic appeal from this judgment was taken

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1. "TR" refers to the transcript of record on appeal from the United States District Court filed with this Court on March 12, 1968.

to the California Supreme Court and was affirmed on December 1, 1959, in an opinion which is reported at 53 Cal.2d 160, 346 P.2d 764 (1959) (TR 46).

B. Proceedings in federal court:

Appellee sought and was granted a writ of certiorari by the United States Supreme Court following the California Supreme Court's affirmance of his conviction. Briefs were filed and the matter was orally argued following which the Court, based upon its examination of the record, concluded that the totality of the circumstances did not warrant bringing the case before it, and accordingly, dismissed the writ. Atchley v. California, 366 U.S. 207 (1961) (TR 46).

Appellee then applied to the United States District Court for the Northern District of California for a writ of habeas corpus. Judge Sweigert denied the writ and petitioner appealed to this Court which affirmed the denial. Atchley v. Dickson, 338 F.2d 1014 (9th Cir. 1964) (TR 46).

The instant action commenced when appellee filed an application for writ of habeas corpus in the United States District Court for the Northern District of California on March 10, 1967 (TR 2). An order to show cause was issued by the Honorable Robert Peckham (TR 22) and counsel was appointed to represent petitioner (TR 41). Supplemental returns and traverses were filed following which the District Court ordered that a writ of habeas corpus issue unless the State affords petitioner either a hearing on the issue of the voluntariness of his confession, or a new trial (TR 75).

A certificate of probable cause to appeal was granted and notice of appeal filed on February 20, 1968 (TR 81-82).

C. Commutation proceedings:

Governor Edmund G. Brown commuted petitioner's sentence of death to life imprisonment with the possibility of parole (TR 13, 46).

ARGUMENT

I.

THE UNITED STATES DISTRICT COURT ERRED IN ORDERING THE CALIFORNIA COURTS TO HOLD A HEARING ON THE VOLUNTARINESS OF PETITIONER'S RECORDED STATEMENTS.

At approximately 2:30 a.m. on the morning of August 3, 1958, appellee murdered his estranged wife by shooting her six times after lying in wait at her home (TR 48-49). Following the shooting he returned to his home where he was arrested by the police at approximately 4:00 a.m. (TR 49).

Following his apprehension petitioner phoned Travers, his friend and insurance agent. In accordance with petitioner's request Travers visited him in jail on the morning of August 5, 1959, and was told of the events surrounding the shooting by petitioner (RT 996-998).[2/] As he was leaving the jail Travers informed the authorities of this conversation and acceded to their request that they be allowed to record his conversation with petitioner that

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2. "RT" refers to the Reporter's Transcript of trial lodged with the District Court.

afternoon. This second conversation resulted in the tape recording which the district court has held was not properly shown to have been voluntary before it was introduced at trial.

Prior to permitting the introduction of this tape recorded conversation the trial judge held a hearing in chambers, listened to the tape recording and heard arguments of counsel respecting its admissibility (RT 938-992; TR 54). In the presence of the jury evidence was taken on the voluntariness of the conversation and the tape recording was subsequently admitted.

At this time California followed the so-called "Massachusetts" procedure for the admission of confessions. The burden rested upon the prosecution to show that the confession was voluntary [People v. Trout, 54 Cal.2d 576, 583, 354 P.2d 231, 235 (1960); People v. Berve, 51 Cal.2d 286, 291, 332 P.2d 97, 99 (1958)]. The defendant was then permitted to offer evidence in contradicition of the prosecution's showing and the trial judge had to exclude the confession if he found it was improperly obtained. If the trial judge initially found that the confession was free and voluntary it was introduced and, if the evidence were in conflict as to the circumstances surrounding the confession [People v. Blevins, 54 Cal.2d 71, 77, 351 P.2d 776, 780 (1960)] the jury had to be instructed that they had the final power of determination on the issue of voluntariness in that they must disregard the confession if they believed that it was not properly obtained. [People v. Baldwin, 42 Cal.2d 858,

866, 270 P.2d 1028, 1033 (1954); People v. Gonzalves, 24 Cal.2d 870, 876; 151 P.2d 251, 254 (1944)].

In reviewing the admission of this statement the California Supreme Court noted: 1) That Travers testified that no threats were made, that no inducements were offerred, and that in an earlier conversation petitioner had volunteered, without being questioned, substantially the same statements as those on the tape recording; 2) That at no time during the trial did petitioner contradict Travers' testimony or suggest that any of his recorded statements were untrue; 3) And, that although the recorded conversation demonstrated that Travers referred to the insurance policy - a deception similar to that condemned in Leyra v. Denno, 347 U.S. 556 (1954) - he did so only to explain why he was asking questions and not as an inducement for any particular answers. Thus, there was no comparable mental coercion and the deception itself did not render defendant's statements inadmissible since it was not a type reasonabley likely to procure an untrue statement. People v. Atchley, supra, 53 Cal.2d at 170-171, 346 P.2d at 769 (1959).

A. Petitioner's statement was voluntary as a matter of law.

As noted in Davis v. North Carolina, 384 U.S. 737, 740 (1966) the non-retroactive effect of Miranda does not affect the duty of trial courts to consider claims that a statement was taken under circumstances which violated the standards of voluntariness as those standards had begun to evolve long before the Supreme Court's decision in

Miranda and Escobedo. Although there are numerous circumstances to be considered in deciding a claim of involuntariness the test remains: "Is the confession a product of an essentially free and unconstrained choice by its maker?" Culombe v. Connecticut, 367 U.S. 568, 602 (1961). For the following reasons appellant submits that in this case the answer is "Yes" as a matter of law.

The only reference contained in the district court's "Memorandum of Decision" to the initial conversation between petitioner and Travers is:

> "Travers testified that he had visited the jail on the morning of August 5th and conversed with Atchley at Atchley's request. After that conversation, Travers admitted that he was asked by the under sheriff to engage Atchley in a second conversation which would be recorded and that he complied with the request. Travers further testified that he offered no threat, promise or inducement to Atchley." (TR 69).

Although this summary of the first and second conversations is correct appellant submits that its brevity overlooks its importance. We have consistently contended that the tape recorded conversation, being substantially the same as the initial conversation, is voluntary as a matter of law.

Travers testified that on the evening of August 4, petitioner requested that he visit him in order to talk about the insurance policy and replenish his supply of cigarettes (RT 997, 999). Of this initial conversation

Travers said:

> "Mr. Atchley brought the subject up to me when he was sitting there. I was sitting there and we were talking about the policy and he brought the whole story as he told it to me exactly what happened. He voluntarily told me about it. I did not ask him about it the first time." (RT 1008).

Travers testified on cross-examination, that prior to his initial conversation with petitioner he was never asked by the police to interrogate him about the shooting (RT 1007). In response to further questioning by petitioner's attorney Travers testified that ". . . the first and second conversations was just about the same except I asked more questions the second time. . ." (RT 1008, 1013).

After the morning conversation Travers told Officer Spann what petitioner had told him and informed him that he had to return later in order to secure further information for his insurance company. In response to Spann's request he agreed to allow the officers to record his next conversation with petitioner(RT 997). He did not offer petitioner any threat or inducement to secure the statements made during the recorded conversation and petitioner acknowledged to him that he understood what he said would have to be reported to the insurance company (RT 998).

Appellant submits that upon the state of this record it must be held that petitioner's first conversation with Travers was voluntary as a matter of law. No prejudice

could have occurred in the admission of the tape recording since it contained substantially the same statements Travers could have testified petitioner made during their first conversation. Therefore, the district court erred in not holding the statement voluntary as a matter of law and in ordering a hearing in the state court on the issue of voluntariness.

B. The California courts have previously conducted a full and fair hearing on this issue and the district court erred in holding that the presumptive validity of their determination has been refuted.

The district court ". . . is of the opinion that petitioner has successfully rebutted the presumption contained in 28 U.S.C. § 2254(d), . . ." (TR 75 note 8). The only support in the record for this finding is petitioner's supplemental traverse which states:

> "Analysis of this statute [28 U.S.C. 2254(d)] shows however, that the State's position is untenable.
>
> "It provides that such a presumption exists only if the petitioner fails to show that, among other exceptions, the material facts were not adequately developed at the state court hearing or that the state court determination is not supported by the record. It is respectfully submitted that each of these exceptions have been met, and that, consequently, no presumption exists." (TR 65).

Thus, the district court held that the trial court's failure

to receive evidence on five[3] issues resulted in: (1) an inadequate development of the material facts [section 2254 (d)(3)] which; (2) rendered the finding of voluntariness devoid of support on this record [section 2254(d)(8)] and thus rebutted the presumption of validity established by section 2254(d). Since all of these deficiencies pertain to the voluntariness of the second conversation we submit, for the reasons stated above, that they are irrelevant.

In reaching this result the district court has erroneously concluded that certain applications of the test of voluntariness [Whether an examination of "the totality of the circumstances" shows that the defendant was deprived of "a free choice to admit, to deny, or to refuse to answer." Lisenba v. California, 314 U.S. 219, 241 (1941).] by the United States Supreme Court after petitioner's trial[4] were an announcement of new law in the field of voluntariness. The district court then concluded from this premise that

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3. The five issues, discussed individually infra are:

i) Evidence that petitioner had communicated with police his desire to have an attorney;
ii) Evidence that Travers feigned sympathy for his friend and deceived him about his motives in questioning him;
iii) Evidence as to whether petitioner knew the statements were being tape recorded;
iv) The testimony of Officer Spann as to what he said to Travers before the tape recorded statements were elicited, and
v) Evidence relating to petitioner's mental condition, his ability to read and write and the extent of his education. (TR 71-72).

4. Reck v. Pate, 367 U.S. 433 (1961); Culombe v. Connecticut, 367 U.S. 568 (1961); Gallegos v. Colorado, 370 U.S. 49 (1962); and Davis v. North Carolina, 384 U.S. 737 (1966).

because of the retroactive application of Jackson v. Denno, 378 U.S. 368 (1964), an evidentiary hearing is required to determine whether the application of the test of voluntariness as subsequently enunciated by the United States Supreme Court [see footnote 4] would lead to a different result in petitioner's case. In those cases which concern the district court the United States Supreme Court did not announce any new circumstances to be considered in determining voluntariness.[5/] The holdings of the United States Supreme Court which the district court feels compel an evidentiary hearing were not only implicit in earlier United States Supreme Court cases but were the law in California at the time of petitioner's trial.[6/] Appellant submits that the test of voluntariness was not changed by these cases and, the United States Supreme Court does not envision nor require, re-litigation of this issue everytime its application of the test results in a reversal.

The district court, noting that the trial court failed to consider evidence that petitioner was attempting to get an attorney at the time he talked to Travers, cites

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5. See Chambers v. Florida, 309 U.S. 227 (1939); Ashcraft v. Tennessee, 322 U.S. 143 (1943); Lisenba v. California, 314 U.S. 219 (1941); Turner v. Pennsylvania, 338 U.S. 62 (1949); Johnson v. Pennsylvania, 340 U.S. 881 (1950); and Fikes v. Alabama, 352 U.S. 191 (1955).

6. See In re Wallace, 24 Cal.2d 933, 937, 152 P.2d 1, 3 (1944); People v. Stroble, 36 Cal.2d 615, 624-627, 226 P.2d 330, 336-338 (1951); People v. Millum, 42 Cal.2d 524, 526-528, 267 P.2d 1039, 1040 (1954); People v. Berve, 51 Cal.2d 286, 292, 332 P.2d 97, 100 (1958); and People v. Speaks, 156 Cal.App.2d 25, 36-37, 39, 319 P.2d 709, 716-719 (1957).

Reck v. Pate, 467 U.S. 443 (1961) and Columbe v. Connecticut, 367 U.S. 568 (1961), to support its holding that material facts were not developed and thus the record does not support the finding of voluntariness. As stated above, we submit that neither of those cases established any new law in the field of voluntariness, they merely reviewed "the totality of the circumstances" present in each case, and concluded that a condition to be considered in passing on voluntariness was failure to receive counsel after request. California courts had earlier reached this same conclusion in People v. Stroble, 36 Cal.2d 615, 624-627, 226 P.2d 330, 336-338 (1951). Thus, we concur with both the district court's, and the California Supreme Court's holding that the trial court erred in excluding evidence on the issue of petitioner's request for counsel. However, as noted by the California Supreme Court petitioner has failed to show that this was prejudicial:

> "Although a refusal to permit defendant to talk to counsel suggests an attempt to coerce, it seems highly improbable that the trial judge or the jury would have inferred coercion from such a refusal alone in the light of the substantial and uncontradicted evidence that no coercion occurred." People v. Atchley, supra, 53 Cal.2d at 171; 346 P.2d at 770.

In discussing the district court's second allegation of improperly excluded evidence - that bearing on the application of Leyra v. Denno, 347 U.S. 556 (1954) through Travers' feigned sympathy for his friend - the California

Supreme Court noted:

> "In that case the police, having promised a suspect medical treatment for an acutely painful attack of sinus, introduced as the 'doctor' a highly skilled psychiatrist with considerable knowledge of hypnosis. . . . Although there was a similar deception in the present case, there was no comparable mental coercion. The deception itself does not render defendant's statements inadmissible, for it was not of a type reasonably likely to procure an untrue statement." People v. Atchley, supra.

In further support of its holding that failure to hear testimony on this point requires the issuance of the writ the district court cited Spanno v. New York, 360 U.S. 315 (1959). There, a police officer friend of the defendant's was instructed to tell the defendant that because he had called on him his job was in jeopardy. Of course, Spanno had also been questioned throughout the night and the ultimate finding of the Supreme Court was that his will had been overborne by official pressure, fatigue and sympathy falsely aroused. Appellant submits that no similar finding can be made in this case.

The district court next assigns as error the trial court's failure to take evidence relating to whether petioner knew the conversation was being recorded. Appellant submits, that such evidence would be immaterial. It is well established "that a jail shares none of the attributes of privacy of a home, an automobile, an office or a hotel room," Lanza

v. New York, 370 U.S. 139, 143 (1961); that inmates of prisons do not have the usual array of federal and state constitutional rights guaranteed to non-incarcerated citizens, Price v. Johnson, 334 U.S. 266, 285 (1947); and that prison authorities may subject inmates to an intense surveillance and search unimpeded by Fourth Amendment barriers. Lanza v. New York, supra. In People v. Morgan, 197 Cal.App.2d 90, 92-94, 16 Cal. Rptr. 838, 840 (1961); cert. denied, 370 U.S. 965 (1962), it was held that an electronic recording of a conversation between a county jail prisoner and his sister was not an illegal search and seizure nor an unlawful invasion of the prisoner's privacy. The court remarked:

> "A man detained in jail cannot reasonably expect to enjoy the privacy afforded to a person in free society. His lack of privacy is a necessary adjunct to his imprisonment."

As a fourth assignment of error the district court cites the trial court's limitation of the proposed cross-examination of Officer Spann to those matters covered in direct examination. California and a majority of states follow the federal rule restricting cross-examination to the scope of the direct examination in contrast to the "wide open" rule followed in England and a few American states which allow cross-examination on any matter relevant to the issues of the case regardless of whether it was raised during direct examination. Thus, we submit that not only did the trial court properly limit the scope of the proposed examination of Officer Spann but furthermore,

no prejudice can be shown since the defense attorney knew he could call any of the People's witnesses as his own and examine them on any matters he wished (RT 932).

The fifth assignment of error is the trial court's failure to obtain evidence relating to petitioner's mental condition, whether he was able to read or write and the extent of his education.

It should be noted here that although the issue of voluntariness was presented at trial, on direct appeal, certiorari, and is the sole grounds for the district court's order from which we have appealed, the admission of this tape recording was opposed at trial primarily on the grounds of privilaged communication (RT 942-945).

Appellant contends that the burden of introducing evidence on a defendant's mental condition, his literacy and the extent of his education, rests upon him if he intends to seriously challenge his statement as being involuntary. It is clear from the record (TR 72 note 4) that considerable evidence on these issues was eventually presented at trial by the petitioner. Thus, the failure to elicit this type of testimony on voir dire prior to the introduction of the tape should not now be charged against the prosecution.

II.

THE ORDER APPEALED FROM ERRONEOUSLY DIRECTS THE CALIFORNIA COURTS TO ACT IN EXCESS OF THEIR JURISDICTION.

If we do not prevail upon the arguments above we respectfully request that this Court modify the following language of the district court's order:

"Accordingly, the writ of habeas corpus is granted unless the State, within a reasonable time, affords Atchley either a hearing on the issue of voluntariness which is consistent with the requirements of due process or a new trial, failing which Atchley is entitled to his release." (TR 75).

Petitioner's judgment of conviction has long since become final in the California Courts. Hence, there is no state court which presently possesses jurisdiction over this cause to hold a hearing on the issue of voluntariness as envisioned by the district court's order. The necessary jurisdiction can be conferred on a California court pursuant to its habeas corpus jurisdiction (Calif. Const., art. VI, § 10) however, in order to invest such jurisdiction an application must be made by petition signed either by the party seeking relief or some person in his behalf (Calif. Pen. Code § 1474).

Appellant respectfully submits that the district court has ordered the state courts to either conduct a hearing, which they are without jurisdiction to hold unless petitioner takes the affirmative act of filing a petition, or release him. Wherefore, we respectfully request that the order of the district court be modified to direct petitioner to file a petition for habeas corpus in the California Supreme Court in order to invest the state courts with the necessary jurisdiction to comply with the order of the district court.

CONCLUSION

We respectfully submit that this Court should reverse the order of the District Court on the grounds that the statement made by petitioner to Travers was voluntary as a matter of law or, that a full and fair hearing at which the material facts on the issue were adequately developed was held in the state court and pursuant to Title 28 U.S.C., section 2254(d), the holding of the state court being presumptively valid should be upheld.

DATED: June 18, 1968

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: June 18, 1968

William D. Stein

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